THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

Coram: *Katureebe, C.J., Tumwesigye; Arach-Amoko; Mwondha; Tibatemwa; JJ.S.C.*

CIVIL APPEAL NO. 014 OF 2015

BETWEEN

MOHAMMED MOHAMMED HAMID ..... APPELLANT

AND

ROKO CONSTRUCTION LTD ..... RESPONDENT

(Appeal arising from the judgment of the Court of Appeal No. 51 of 2011 by Opio-Aweri, Solome Balungi Bossa, and Richard Buteera JJA in Civil Appeal No 51 of 2015 dated 13th July, 2015)

JUDGMENT OF MWONDHA JSC

Background

The Appellant entered into a construction contract with the respondent to construct the respondent's house at Plot 43 B Windsor Close, Kololo, Kampala at the agreed sum of UShs.1,100,000,000/= excluding VAT among others. The appellant paid part of the construction sum and the respondent started the construction works. Whereas both parties signed the bills of quantities the respondent signed the Articles of the Agreement and passed them on to the appellant to sign but the appellant did not return a signed copy to the Respondent. The Respondent did substantial construction work but the appellant failed to pay for all the work done. The respondent served Notices under the provisions of the contract to suspend construction. The respondent issued a notice of termination in accordance with the terms of the contract and there after issued a notice

of arbitration under the terms of the contract to the appellant to agree to the appointment of an Arbitrator. The appellant never responded.

The respondent applied to the President of East African Institute of Architects to appoint the Arbitrator in accordance with the terms of the contract and gave a copy of the application to the Appellant among others. He also applied to the Centre for Arbitration and Dispute Resolution (CEDAR) to appoint an arbitrator, a statutory appointment under S. 11 (4) (c), Arbitration and Conciliation Act (ACA). CADER appointed Hon. Justice Alfred Karokora who heard both parties and delivered the award on 30th June 2009 in the presence of both parties and Counsel.

He ordered the appellant to pay Shs,584,430, 571/= with interest of 18% per annum from the date of filing the claim until payment in full, general damages of Ushs.100,000,000/= with interest of 18% per annum from the date of the award until payment in full. The bill of costs was taxed by the Arbitrator and allowed at Uganda Shillings 92,507,410/= per annum on 4th November, 2009.

The appellant, dissatisfied with the award, filed a High Court (Commercial Division) Civil Application No. 731 of 209 to set aside the award on 14th January 2010. The High Court presided over by Justice G. Kiryabwire heard the application and set aside the award. The basis for setting aside the award was that the condition of arbitration was deleted from the Building Contract and therefore the Arbitrator had no jurisdiction to make the award.

The respondent with leave of the High Court appealed to Court of Appeal in Civil Appeal No 51 of 2011. The Court of Appeal allowed the appeal on the basis that the appellant's appeal fell within the ambit of Section 16 of the ACA not Section 34 of ACA. The appellant appealed to the Supreme Court, Civil Appeal No. 1 of 2013. The Supreme Court found that whereas the Court of Appeal's Coram that heard that appeal consisted of Hon Lady

Justice Mpagi Bahigaine, DCJ, Hon. Justice Steven Kavuma, JA and Hon. Justice Remmy Kasule JA, the judgment was delivered by Hon. S. B. Kavuma JA, Hon Remmy Kasule JA and Hon. Justice Nshimye JA. The Supreme Court returned the file to the Court of Appeal to constitute a different Coram to hear and decide the appeal.

The Court of Appeal new Coram composed of Hon. Justice Opio-Aweri JA, Hon Lady Justice Balungi Bossa JA and Hon. Richard Buteera JA, heard the appeal afresh quashed the decision of the High Court and re-instated the Award. The Appellant was dissatisfied with that decision and filed this Appeal No. 14 of 2015.

The memorandum of Appeal had five grounds of appeal as follows:-

(1) The learned Justice of the Court of Appeal erred in law when they held that the building contract having not been signed, and the arbitration clause having not been executed was overtaken by events and therefore moot.

(2) The learned Justices of the Court of Appeal erred in law when they held that the doctrine of part performance could and did cure the want of jurisdiction of the arbitration tribunal, in the absence of a signed arbitration agreement.

(3) The learned Justices of the Court of Appeal erred in law when they held that there was a written arbitration agreement.

(4) The learned Justices of the Court of Appeal erred in law when they held that the application to set aside the arbitration award was made out of time.

(5) The learned Justices of the Court of Appeal erred in law when they held that the appeal that was brought before them was competent.

It was proposed that this Court orders that:-

(a) The judgment and orders of the Court of Appeal in Civil Appeal No. 51 of 2011 be set aside.

(b) The decision of the High Court in Civil Application No. 731 of 2009 be re-instated

(c) The costs of the appeal in this Court and courts below including those incurred before the Arbitration Tribunal be borne by the respondent.

Representation:

Mr. Godfrey Lule and Peter Allan Musoke appeared for the appellant. Mr. Enos Tumusiime appeared for the Respondent. Mr. Mark Koehler the Managing Director to Roko Construction Ltd. was in Court.

Appellant's submissions:-

Ground I

Counsel for the appellant submitted that the learned Justices of Appeal failed to draw the correct inferences of fact as to the true date the respondent alleged to be the date of the contract governing the parties upon which the CADER entertained the application to appoint the arbitrator under Section 2 of the Act in the absence of a written arbitration agreement signed by all parties. He said this was contrary to the express applicable provisions of S. 3 (2) (a) of the Act. He argued that the date of 15th November 2015, the Chief Administrator Mark Koehler gave in Misc. Cause No. 137 of 2007 was false because Annex "A" which Koehler referred to bore no date. It could not be the Contract agreement the parties could have entered into. The date of 25th July 2005 was no where on that Annex "A"

He argued further that S.3 (I) of the Contract Act which was the prevailing law then governing contracts was not considered by the Appeal Court. It prohibited anybody to institute a suit against someone to answer for a debt, unless the agreement on which the suit is brought was in writing

and signed by the defendant. He submitted that even if part performance was applicable which was not the case, the arbitration clause or agreement would still be invalid for lack of appellant's signature among other things. He stated that S. 3 (4) of the Contract Act leaves no room for part performance but if the respondent wanted specific performance, where the doctrine of part performance applies they ought to have sued the contractor in tort not ACA. He submitted that part performance is a rule of equity and cannot nagate or substitute a statutory provision. He added that in regard to the appellant's affidavit and oral submission on record, the learned Justices of Appeal's conclusion that the Appellant too acted on Annex A is not sustainable.

He submitted further that on record there was only one document admitted to have been signed by both parties on 29th July, 2005 and 1st August, 2005. It was a single page document titled **Completion Contract of Residential House Plot 43 B etc Main summary.** That this document constituted the written component of the contract, the other component being oral. That was not an Annex to "A" or A_2 or any other contractual document.

He argued that the statement of Mr. Lakic dated 9th January 2008 in Volume I at page 210 particularly page 211 of the Record of Appeal read "Despite various reminders, an original countersigned agreement was not returned to the claimant by the appellant." He submitted that this was an admission by the respondent, that the appellant did not sign the agreement brought by the respondent as Annexture.

He submitted that it was Annex "A" which contained the impugned clause 36 and there was no arbitration agreement as required by the Act. So he argued that the award ought to be set aside as there was no valid contract between the parties binding upon them.

Ground 2 and 3

Counsel reiterated the submissions on ground one but added that there could not be estoppel against a statute, and there was no valid source of arbitrator's jurisdiction.

Ground 4

Counsel submitted that the application to set aside the arbitral award was not made out of time. He argued that S.34 (3) which provides for one month within which to file the application arises only when the aggrieved party has received the arbitral award notice. He cited Blacks Law Dictionary on the definition of "receive." He argued among others that receiving the arbitral award under S. 34 (3) of the ACA mean getting hold of a written copy of the award. He added that, that is why Section 35 (2) of the ACA provides for a condition precedent of a duly authenticated original award or duly certified copy. He asserted that, S. 35 makes it clear that in the context of the ACA the award can only be received in the form of substance of a tangible document not audio.

He further submitted that under S. 34 (4) of ACA, time starts to run the next day after the award document is received by the aggrieved party through a recognised form of service of documents. He argued that the criteria is on receiving the award documents not on hearing the award pronouncements. He contended that section 8 of the Act helps in resolving the questions of what amounts to receipt in the context of the arbitral award.

He argued that after the pronouncement of the award, a party which files, has to serve notice of the filing of the award upon the other party. In this case it was the respondent who filed. The Respondent had to certify in writing the date and manner the service was affected under rule 7 (I) of the first schedule of the arbitration Rules. If any party objected to the award filed in Court such party objecting may within 90 days after notice of filing of the award apply for the award to be set aside.

He contended that there was no service effected as envisaged and prescribed in S. 34 (3) of the Act among others. The alternative route to achieve the same objective in the circumstance was S. 71 (I) (b) of the Act and rule (7) of the ACA rules. He maintained that, the application was timely and could not be defeated on account of limitation having filed it within 90 days. He prayed that the decisions of the Court of Appeal to the effect, that the application was filed out of time be reversed.

Ground 5:

Counsel submitted that the ACA is a special enactment designed among others to meet a special judicial regime and provided special tools and mechanisms to achieve speedy and cheaper results compared to the general and ordinary conventional judicial process. He further submitted that it is a later Act to the Civil Procedure Act (CPA) and so where a provision of CPA would detract or derogate from a provision, the latter must prevail. He said it followed that S. 66 of CPA had no business in this matter. He argued that the Court of Appeal Justices overlooked S. 38 of the ACA and in the result arrived at a wrong conclusion regarding the competence of the respondents appeal. He contended that leave to appeal was granted by the High Court in error. He argued that lack of objection by the appellant's Counsel did not oust the express provisions of the statute nor did it confer jurisdiction on the Court of Appeal. He asserted that Court of Appeal and High Court acted ultra vires and the decision has to be quashed by this Court.

Respondent's submissions:-

In reply to the appellant's submissions, Counsel for the respondent submitted on grounds 1, 2 and 3 together. He argued that the contract entered into by the parties was "the East African Institute of Architects, Agreement and schedule of Conditions of Building Contract (with Quantities) and was between **Mohammed Mohammed Hamid and Roko Construction Ltd** as was shown on the first page of the content

document. It had Articles of Agreement and it repeated the names of the parties to the contract on the second page, which were the Appellant and Respondent respectively. He submitted the Contract showed that the purpose of the Contract was "Completion of a Residential House at Plot 43 B Windsor Kololo Kampala. The last line of the second page of the Contract showed clearly at page 18 ... that the Contract Bills had been signed by and on behalf of the parties thereto. The Contract Bills of Quantities were at pages 59 – 103 of the Record of Appeal. He submitted that the Bills of quantities were signed by both parties on 29th July 2005. He among others affirmed that the bills of quantities incorporated clause 36 of the Articles of the Agreement. Both the Articles and bills of quantities reflected the contract sum of Shs. 1,100,000,000/=.

He further, among others, submitted that at page 62, para 12 it had "A summary of the Conditions of Contract and at page 65 of the Record of Appeal had clause 36: Arbitration. He said that from pages 62 - 67 at the bottom was a statement "General conditions carried to the main summary, which was at page 103 of the, Record of Appeal that had been signed by both the appellant and the Respondent on 29th July 2005. Counsel concluded that the appellant and respondent entered into a building contract that has an arbitration clause 36.

Counsel submitted that its trite law that where one of the parties signs a contract and the other doesn't but both parties act, relying on that Contract it binds both of them. He contended that even if it was assumed that the appellant did not sign, which was not the case, the doctrine of part performance would protect the respondent. He relied on cases of **Credit Finance Corp Ltd V. Ali Mwakasanga [1959] E.A. 79, Roko Construction Ltd Vs Kakira Sugar Works Ltd ARB Cause No 07 of 2007 judgment of S. Wako Wambuzi. CJ**

He submitted that the appellant admitted before the Supreme Court and his submissions at page 6 there to the 1st sentence of the 2nd paragraph,

that Clause 36 of the Arbitration Agreement was not deleted and the arbitrator Agreement was not deleted, the arbitration has jurisdiction to make the award. He prayed that grounds 1, 2, and 3 should be dismissed.

On the 4th ground Counsel submitted that the appellant failed to file the application against the arbitrator's decision and took almost two years without doing so. The application to set aside the award was out of time as per S. 34 (3) of the ACA.

He argued that S. 34 (3) of the Act provides that **an application to set aside an arbitral award may not be made after one month has lapsed from the date on which the party making the application received the arbitral award**. He submitted that the arbitrator delivered the award on 30th June 2009 in the presence of Mr. Moses Kimuli Counsel for the Appellant then. The respondent's bill of costs was taxed in the presence of the appellant on 4th November 2009.

Counsel further contended that the one month within which to apply to set aside the award expired on 30/7/2009 and therefore Civil Application No. 731 of 2009 filed on the 14th January, 2010 was out of time. He relied on the case of **Makula International Ltd v. H E. Cardinal Nsubuga and Another at page 16 Civil Appeal No. 4 of 1981 where it was held, "it is well established that a Court has no residual or inherent jurisdiction to enlarge a period of time laid down by statute.... extending time ..... several months after the expiry of statutory period was made without jurisdiction. It is nullity and must be set aside.**"

He argued that the High Court decision to extend time was a nullity.

He submitted that the agreement by learned Counsel for the appellant to the effect that he had 90 days to file an application to set aside the arbitral award as per the 1st schedule rule 7 (I) of the Arbitration Rules could not stand. This was so because the 1st schedule rule 7 (I) of the Arbitration rules was inconsistent with the Act (ACA).

He also relied on the case of **Uganda Lottery Ltd v. Attorney General Misc. Cause HC No 627 of 2008** which inter alia held that the Act prevails over the rules.

In addition he argued that S. 9 of ACA prohibits any Court to intervene in matters governed by the Act except as provided by it, and so this ground must fail.

On the 5th ground Counsel submitted that the appellant's Counsel ignored Article 134 (2) of Constitution and Section 38 (3) of the ACA among others.

Articles 134(2) of the Constitution provides: "An appeal shall lie to the Court of Appeal from such decisions of the High Court as may be prescribed by law."

S.38 (3) of ACA provides: "An appeal shall lie to the Court of Appeal against the decisions of the Court ... if:-

(a) The parties have so agreed that an appeal shall lie

(b) The Court grants leave to appeal"

He submitted that on the 9th March 2011 upon delivery of the Ruling the High Court granted leave to the respondent to appeal to Court of Appeal in the presence of Counsel for the appellant. The application for leave to appeal to Court of Appeal by the respondent was not apposed. And that satisfied S. 38 (3) (b) of the ACA and so this ground must be dismissed.

Consideration of the appeal:

This is a second appeal which arose as a result of this Court's direction that Civil Appeal No. 1 of 2013 in which the parties were the same as in this appeal, be returned to the Court of Appeal and was returned to facilitate Constituting a new Coram to hear and decide the appeal denovo.

The law on second appeals to the Supreme Court has long been stated in various cases of this Court. In the **Masembe v. Sugar Corporation** and

another **Supreme Court of Uganda Civil Appeal No. 1 of 2000 [2000] EA 434** specifically at page 435, it was held inter alia "On second appeal, the Supreme Court was not required to re-evaluate the evidence in the same manner as a first appellate Court would as doing so would create unnecessary uncertainty. It was sufficient to decide whether the first appellate Court on approaching its task has applied the relevant principles properly. (**Kifamunte Henry v. Uganda [1997] LLR 72 (SCU**) followed.

There is no doubt in my mind that the first appellate Court approached its task properly applying the relevant principles.

I perused the record of appeal and considered the submissions of both Counsel, it was clear that grounds 1, 2, and 3 were based on two Issues:- **whether there was an Arbitration clause in the agreement or the Arbitration clause was deleted after it had been incorporated in the Agreement**.

(2) Whether the Agreement was signed by both parties or not and if not whether it rendered the arbitration clause in the agreement invalid.

It was clear on the record of both the Court of Appeal and this Court that learned Counsel for the appellant admitted that the arbitration clause was in the Building Contract/Agreement, not deleted. At the hearing of the appeal in the Court of Appeal both Counsel agreed that during the Supreme Court proceedings it was conceded that the Arbitration Clause of the relevant agreement in contention was not deleted. The Court of Appeal at page 855 of its judgment recorded "we have read the Supreme Court proceedings. It is clear at page 10 of the proceedings that learned Counsel Mr. Lule conceded that the arbitration clause was not deleted from the agreement. He maintained that position at the hearing of the appeal. The learned Judge at the High Court had ruled that the Arbitration Clause had been deleted. The situation now is that there was an

arbitration clause in the agreement ..... Ground one was therefore overtaken by events and it is declared moot."

There was no argument any longer whether or not there was an arbitration clause. The evidence on record showed that it was there and Counsel for the appellant conceded that they signed on the first page and this was taken to the main summary signed on 29/07/2005 and 01/08/2005. I found the faulting of the Court of Appeal unjustified.

At the hearing of the Appeal Counsel for the Appellant conceded to the signing by both of them on the 29th July 2005 and 1st August, 2005 though he submitted that it was only the single page the appellant signed. He conceded that it was the only written document headed "Completion Contract of Residential House Plot 43 B etc main summary which was a document of engagement signed by both parties. He admitted in the written submissions at page 4 that after signing on 1st August 2005 the respondent commenced performing the building service in pursuance of it. He added further that under it both parties part performed. He affirmed that, that was the only written component the other being oral.

The faulting of the learned Justices of the Court of Appeal on the ground that they failed in their duty to consider giving effect to S.3 (I) of the contract Act Cap 73 which was the prevailing law then governing contracts cannot hold. And also the argument that part performance doctrine could not apply could not be sustained. It is clear from the record of Appeal that this was a matter governed by the Arbitration and Conciliation Act because the contract had an arbitration clause and both parties had acted on it.

There was evidence that the appellant (now) had promised to sign and return the counter signed contract agreement, but instead he deposited part of the contract money and this was the basis upon which the respondent started the completion works.

It is apparent that the appellant would be estopped from denying that there was an arbitration clause in the Contract when the parties made part performance.

I had the liberty to read the authority relied on by learned Counsel for the respondent, the case of **Credit Finance Corporation Ltd v. Ali Mwakasanga [1959] IEA 79 (CAD)** and which was referred to by Hon. Justice Karokora JSC the Arbitrator.

Windham JA had this to say "The doctrine whereby part performance will supply want of format execution of a contract was laid down in very clear terms by the **House of Lords in Brogen v. Metropolitan Railway Co (I) (1877**), 2 App cases 666. Where the facts were in essence very similar to those in the present case, and where a draft of a contract which one of the parties had not signed was held a valid contract binding upon the other party by reason of their having acted upon it; in the words of Lord Blackburn at page 693 "if both parties have acted upon that draft and treated it as binding they will be bound by it." Also S. Wambuzi CJ in **Roko Construction Ltd v. Kakira Sugar Works ARB cause No 7 of 2007 enchoed** the same doctrine.

I concur with the authority cited and answer the 2nd issue in the negative. The part performance cured the want of signature .

I find that there was a contract/ agreement between Mohammed Mohammed Hamid and Roko Construction Ltd entered into by the said parties, the East African Institute of Architects, Agreement and schedule of conditions of Building Contract (with quantities). There was a valid contract. So grounds 1, 2 and 3 would fail.

The 4th ground raised the issue whether or not the application to set aside the arbitration award was made out of time. It is trite law under the Arbitration Act S. 34 (3) that

'An Application for setting aside the arbitral award may not be made after one month has elapsed from the date on which the

party making that application had received the arbitral award……..'

On the submission of Learned Counsel for the appellant that receipt meant getting hold of the written arbitral award or a duly certified or authenticated copy of the award and that hearing the award pronouncement is not receiving the award, relying on rule 7(I) of the first schedule of the Arbitration Rules. These provides "**Any party who objects to an award filed or registered in the Court, may within 90 days after notice of the filing of the award has been served upon that party apply for the award to be set aside and lodge his or her objections to it, together with necessary copies and fees for serving them upon the other party's interested**."

I am not persuaded by the above submissions because S.34 of Arbitration and Conciliation Act specifically provides for "Application for setting aside arbitral award. S. 34 (I) sub section provides "Recourse to Court against an arbitral award may be only by an application for setting **aside the award under subsection 2 and 3**.

I am fortified by the provisions of section 36 which provides for enforcement and makes it even clearer. It provides "**where the time for making an application to set aside the arbitral award under S. 34 has expired, or that application having been made it has been refused, the award shall be enforced in the same manner as if it were a decree of Court**."

I am of the view that rule 7(I) is inconsistent with the earlier provision S. 34 (3) of ACA.

It was not in dispute that Counsel for the appellant then Mr. Kimuli was in Court when the Ruling and award were delivered. It is known practice that when a Ruling or Judgment is going to be delivered notice of the same is given to both parties to facilitate presence of the parties to receive the Judgment or Ruling whatever the case may be.

S.35 of ACA provides for Recognition and Enforcement of the arbitral award. This provides for an arbitral award to be recognised as binding and upon an application in writing to the Court shall be enforced subject to this section. There is nowhere the law requires that an arbitral award to be in writing before it is recognised. This means in my view the arbitral award when it is pronounced it may be in form or substance. Section 35 ACA is crucial for enforcement purposes.

Resorting to the first schedule rule 7(I) of the Rules of the Arbitration Act as learned counsel for the appellant did is not the answer for failure to comply with Section 34(3) of ACA and the submissions based on the said provision can't be acceptable.

Learned author SS Edgar in Statutes Law (7th Edn). Sweet & Maxwell 1971 at page 225 wrote **"A schedule is as much as part of the statute and in as much as an enactment as any other part, but if any enactment in a schedule contradicts an earlier clause prevails against the schedule.** He continued and wrote **"As a general rule "Forms in schedules are inserted merely as examples and are only to be followed implicitly so far as the circumstances of each case may admit**". Consequently, it may **sometimes happen that there is a contradiction between the enactment and the form in the schedule. In such a case it would be quite contrary to the recognised principles upon which Courts of Law construe Acts of Parliament to restrain the operation of an enactment by any reference to the words of a mere form given for Conveniences sake in the schedule."**

S. 72 of ACA provides "Forms, the forms set out in the 2nd schedule to this Act or forms similar to them with such variations as the circumstances of each case requires, may be used for respective purposes in that schedule and if used shall not be called in question."

Putting the above in the context of what learned author Edgar wrote, rule 7 (I) cannot prevail over S. 34 (3) of ACA.

It is apparent on the face of record that the appellant filed the application to set aside the arbitral award long out of time. I accept Counsel for the respondent's submission which was in line with the case **Makula International Ltd vs His Eminence Cardinal Nsubuga and Another (Supra)** it was held among others **"it is well established that a Court has no residual or inherent jurisdiction to enlarge a period of time laid down by Statute. .... extending time ..... several months after the expiry of the statutory period was made without jurisdiction. It is nullity and must be set aside**."

Also section 9 of Arbitration and Conciliation Act prohibits any Court to intervene in matters governed by the Act except as provided by it. It therefore follows that the belated application to set aside the arbitral award in the High Court was incurably defective. This ground would fail.

The 5th ground raised the issue whether S. 66 of the Civil Procedure Act (CPA) was applicable to the facts of this case. Counsel for the appellant submitted and rightly so that the ACA is a special enactment designed among others to meet a special judicial regime and provides special tool and mechanism to achieve speedy and cheaper results than the general and conventional judicial process and so prevails over the Civil Procedure Act among others.

The Court of Appeal Justices reproduced S.66 of the Civil Procedure Act as follows:-

Appeal from Decrees of High Court

"Unless otherwise expressly provided in this Act, an appeal shall lie from the decrees or any part of the decree and from Orders of the High Court to the Court of Appeal."

The Court of Appeal relied also on the **Makula International Ltd v. His Eminence Cardinal Nsubuga and Another (Supra)**. It was held that when an order is made by the High Court on a matter brought before it by some statutory provision other than the CPA or rules, it is appealable as of right unless the appeal is specifically excluded by law. (emphasis is mine)

The Court of Appeal concluded by stating in the judgment that "Applying the above stated principles to the facts of this case we find that this appeal is competent before Court as it appropriately qualified under provisions of S. 66 of the CPA. It is an order made by the High Court on a matter brought before it under the ACA...."

With due respect to the Court of Appeal Justices, I differ from their view and accept learned Counsel for the appellant submissions that section 66 had no place in this case. I also accept that the learned Justices never considered S. 38 (3) of the ACA which provides:-

Notwithstanding sections 9 and 34 an appeal shall lie to the Court of Appeal against a decision of the Court under subsections (2) if

(a) the parties have so agreed that an appeal shall lie and

(b) the Court grants leave to appeal, or where the Court fails to grant leave, the Court of Appeal may exercise any of the powers which the Court could have exercised under subsection (2)

I do not however, accept the submissions by learned Counsel for the appellant that the High Court granted leave to appeal in error.

There were undisputed facts and submissions that the respondent applied for leave to appeal to Court of Appeal on the 9th March 2011 upon delivery of the Ruling by the High Court. The application was in presence of Mr. Kimuli then Counsel for the appellant. The application was not objected to

or opposed. This, in my view infer agreement that an appeal would lie and was in compliance with S. 38 (3) a & b, of ACA.

It is therefore clear to me that the appeal was competent before the Court of Appeal by virtue of S. 38 (3) of ACA. It has to be emphasised that S. 66 of the CPA was not applicable to the facts of this case and the **Makula International Ltd v. His Eminence Cardinal Nsubuga** case the Justices of the Court of Appeal relied on was understood out of context and causes uncertainty. The appeal before them was not of right. The appeal had been excluded by law i.e. the ACA section 9 specifically. This ground would succeed.

It is clear that of the five grounds raised by the appellant four of them failed. In the result I would uphold the decision of the Court of Appeal and dismiss the appeal with costs to the respondent.

Dated this .....05th ..... day of .....May..... 2017

Signed

Faith Mwondha
JUSTICE OF THE SUPREME COURT